A First Amendment Right of Access to the Courts for Indigents

In our legal system, the meritorious claims of indigents are frequently not adjudicated, much less vindicated, because of governmentally-imposed costs of litigation. In some jurisdictions, relief from filing fees is available through the mechanism of proceeding *in forma pauperis*.[1] Many states, however, make no such provision, and those that do frequently waive court fees only in certain actions. Moreover, there are other expenses, such as bond and notice costs, which confront many litigants and for which relief is generally unavailable.[2]

Relying on principles of due process and equal protection, the Supreme Court has already made tentative steps toward a right of judicial access for indigents. The scope of these decisions is limited, however, and the doctrines they invoke raise considerable difficulties. This Note suggests that a more comprehensive and workable theory of access may be developed on the basis of the First Amendment.[3]

I. Due Process and Access

Any discussion of the access rights of indigents must begin with *Boddie v. Connecticut*,[4] where the Supreme Court struck down filing fees in divorce actions as a violation of due process. The majority opinion by Justice Harlan rested on two interlocking principles: (1) that the marriage institution is "fundamental," and (2) that the state required the plaintiffs to "resort to the judicial process" for the adjustment of this fundamental relationship.[5] Since access to the court was "the exclusive precondition"[6] for divorce, the Court found that "[r]esort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend

1. *See, e.g.*, 28 U.S.C. § 1915 (1970). *See generally* Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. L. REV. 21, 33-36 (1967).
2. Silverstein, *supra* note 1, at 35-36.
3. Previous academic comment has, like the courts, focused on issues of due process and equal protection. *See, e.g.*, Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970); Willging, *Financial Barriers and Access of Indigents to the Courts*, 57 GEO. L.J. 253 (1968); Note, *Indigent Access to Civil Courts: The Tiger Is at the Gates*, 26 VAND. L. REV. 25 (1973); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).
4. 401 U.S. 371 (1971).
5. *Id.* at 383.
6. *Id.*

his interests in court,"[7] and that consequently the plaintiffs were entitled to the same rights accorded defendants in more traditional due process cases. As the state could advance no "sufficient countervailing interest,"[8] the Court refused to allow such rights to be frustrated by a filing fee.

Although *Boddie* represents a significant expansion of the right of access for the indigent plaintiff, its doctrinal approach raises substantial problems. First, the Court offers no criteria for determining which interests are fundamental under its due process theory; the opinion fails to explain why marriage is any more important than a number of other interests, such as housing, education, or employment.[9] As Justice Douglas noted in his concurrence, the majority opinion is thus reminiscent of the discredited doctrine of substantive due process.[10]

It is also difficult to discern appropriate limits for the Court's "exclusive precondition" test. As Justice Brennan argued in his concurrence, the state always has the "ultimate monopoly of all judicial process and attendant enforcement machinery,"[11] and thus may be the only effective remedy for an individual seeking to enforce virtually any right. Indeed, it seems artificial to confine such a rationale to judicial access, since many administrative agencies exercise the same monopoly in dispensing vital services or granting licenses for various activities. Thus, the same logic that prohibits fees for divorce actions could apply as well to those charged for marriage licenses.

Recently, in holding in *United States v. Kras*[12] that there is no constitutional right to a free discharge in bankruptcy, the Court made clear that it will take a narrow view of the access right developed in *Boddie*.[13] The Court's opinion illustrates the necessity for drawing

7. *Id.* at 376-77.
8. *Id.* at 380-81.
9. Even Mr. Justice Black, who dissented in *Boddie*, later remarked that its holding could not be restricted to the marriage right. He concluded:

> In my view, the decision in Boddie v. Connecticut can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney. . . . I believe there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes.

Meltzer v. C. Buck LeCraw, 402 U.S. 954, 955-56 (1971) (Black, J., dissenting).
10. 401 U.S. at 384-85 (Douglas, J., concurring).
11. *Id.* at 387 (Brennan, J., concurring).
12. 93 S. Ct. 631 (1973).
13. *Id.* at 636-38. Even the *Kras* dissenters appear to approve the *Boddie* test, disagreeing with the majority only with respect to its application. *Id.* at 644 (Stewart, J., dissenting). The Court has only once indicated a willingness to enlarge *Boddie*'s scope, and there only by indirection. Frederick v. Schwartz, 402 U.S. 937 (1971), *vacating and remanding* 296 F. Supp. 1321 (D. Conn. 1969) (challenge to filing fees in appeals from welfare "fair hearings"). *But see* Ortwein v. Schwab, 41 U.S.L.W. 3473 (U.S. March 5, 1973).

what are essentially arbitrary distinctions in applying the due process approach. Justice Blackmun's majority opinion stated that a discharge in bankruptcy did "not rise to the same constitutional level" as a divorce decree[14] and that there was no exclusive governmental control over the "establishment, enforcement, or dissolution of debts."[15] While these distinctions may be less than compelling,[16] *Kras,* and not *Boddie,* is currently favored by the Court. In *Ortwein v. Schwab*[17] the Court extended the rationale of *Kras* in upholding an Oregon filing fee of $25 for judicial appeals from rulings of the state welfare department. The Court, noting that in *Kras* it had already "emphasized the special nature of the marital relationship"[18] protected in *Boddie,* argued that old-age assistance was of "far less constitutional significance."[19] Justices Douglas, Brennan, Stewart, and Marshall each argued in separate dissents that *Boddie* and not *Kras* should have controlled.[20]

II. Equal Protection and Access

The Equal Protection Clause may seem a more appropriate safeguard for the rights of the indigent plaintiff than the due process rationale of *Boddie.* The Court has already demonstrated its willingness to invalidate financial barriers that discriminate against the poor when fundamental interests are at stake.[21] But despite dicta in some older cases that access to the courts is central to the notion of equal protection,[22] the Court has yet to hold that a plaintiff's right to his day in court is of such a fundamental character as to make de facto wealth discriminations invalid.[23]

14. 93 S. Ct. 631, 638.
15. *Id.*
16. *See id.* at 643 (Stewart, J., dissenting).
17. 41 U.S.L.W. 3473 (U.S. March 5, 1973).
18. *Id.*
19. *Id.*
20. *Id.* at 3474-75.
21. The rights thus protected have so far included the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Harper v. Virginia Bd. of Elec., 383 U.S. 663 (1966); and the right to present a criminal defense, Gardner v. California, 393 U.S. 367 (1969); Roberts v. LaVallee, 389 U.S. 40 (1967); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Coppedge v. United States, 369 U.S. 438 (1962); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).
22. *See, e.g.,* Barbier v. Connolly, 113 U.S. 27, 31 (1885), where the Court stated that the Fourteenth Amendment was intended to insure:
> that all persons . . . should have like access to the courts of the country for the protection of their persons and property, and the prevention and redress of wrongs, and the enforcement of contracts . . . .

23. Nevertheless, there are cases in which the fundamental character of access to the courts is emphasized in strong terms. Thus, in Chambers v. Baltimore & Ohio Ry., 207 U.S. 142, 148 (1907) the Court stated in dicta:
> The right to sue and defend in the courts is the alternative of force. In an organized

The Court's decision in *Lindsey v. Normet*,[24] however, suggests that it may be receptive to such an argument. There the Court struck down, as a violation of equal protection, another Oregon statute requiring tenants to post a double bond when appealing an unfavorable judgment in a forcible entry and detainer action. *Lindsey* ostensibly rests on the rational basis test of equal protection.[25] Since no such bond was required in other actions, and since the state could offer no acceptable rationale for requiring the extra security solely in FED actions, the statute was held to discriminate arbitrarily against tenants as a class.[26] Nevertheless, the opinion suggests a sensitivity to the access rights of the poor in emphasizing the effect of such statutes on the indigent:

> The discrimination against the poor . . . is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be.[27]

Similarly, in *Boddie*, both Justices Douglas and Brennan urged an equal protection rationale as an alternative to the majority's reliance on due process. Both of their concurrences suggest[28] that the "fundamental" right of access required for invoking equal protection analysis can be derived from notions of due process developed in earlier cases involving defendants.[29] However, such an approach obviously takes

society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . .

24. 405 U.S. 56 (1972).

25. *Id.* at 76-77.

26. The case of Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668 (1966), *cert. denied*, 385 U.S. 1037 (1967), had earlier presented a similar issue when the Court was asked to assess the impact of a single-bond requirement on tenants seeking to arrest a summary process eviction. Mr. Justice Douglas, with whom Chief Justice Warren concurred, dissented from the denial of certiorari:

> The effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn upon the tenant's wealth. . . . [T]he promise of equal justice for all would be an empty phrase for the poor if the ability to obtain judicial relief were made to turn on the length of a person's purse.

385 U.S. at 1039.

27. 405 U.S. at 79. In point of fact, the *Lindsey* appellants were indigents, 402 U.S. 941 (1971) (motion for leave to proceed *in forma pauperis* granted), who held month-to-month tenancies, 405 U.S. at 58. A further indication of the Court's concern over the problem of indigency was its citation of the *Griffin* line of decisions, *see* note 21 *supra*, all of which bottom on wealth discrimination. 405 U.S. at 77.

28. Boddie v. Connecticut, 401 U.S. 371, 383-84 (Douglas, J., concurring); *id.* at 386, 388 (Brennan, J., concurring).

29. [T]his case presents a classic problem of equal protection of the laws. The question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection. Certainly, there is at issue the denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain fees. The validity of this partial denial, or differentiation in treatment, can be treated as well under the Equal Protection Clause.

Id. at 388 (Brennan, J., concurring).

one no further than the majority opinion: It involves the same arbitrary determinations of when, and to whom, the due process right applies.

Thus, the issue remains whether the Court will recognize a fundamental access right extending to plaintiffs as well as defendants. The remainder of this Note will argue that the appropriate basis for such a right lies not in the Due Process Clause, but rather in the right to petition guaranteed by the First Amendment—a right which stems from the role of the judiciary as a coordinate branch of government and finds clear recognition in recent decisions of the Supreme Court.

III. A First Amendment Right of Access

A. *Historical and Theoretical Bases of the Right to Petition*

Historically, the right to petition dates back to the Magna Carta[30] and the Declaration of Rights of 1689.[31] The right was reiterated in 1789 when Madison offered his proposed amendments to the Constitution. Although Madison's early draft included the right to apply "to the legislature by petition"[32] and congressional debate focused on access to elected representatives,[33] in the final version the right to petition was extended to the entire "Government." Unfortunately, there is no record of the significance of the change. Yet, given the coequal nature of the branches of American government, it seems reasonable to conclude that the framers intended access to all branches.

In a tripartite system of government, any meaningful right to petition must extend to the judiciary. First, the Constitution allocates to the judiciary the right to nullify legislation that conflicts with the Constitution. Thus, the judicial process is a necessary element in redressing grievances arising from legislative action. Second, the judicial process serves in its broadest sense as a forum for the expression

30. SOURCES OF OUR LIBERTIES 21 (R. Perry ed. 1959). Although the right to petition the King was accorded only to barons in the Magna Carta, subsequent development extended it to all subjects. *Id.* at 229-30.

31. The Bill of Rights of 1689 provided "[t]hat it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal." SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 464 (G. Adams & H. Stephens ed. 1902). *See* A. POLLARD, THE EVOLUTION OF PARLIAMENT 329-31 (2d ed. rev. 1926).

32. 1 ANNALS OF CONG. 452 (1834).

33. Madison, for example, stated:

> [T]he people have a right to express and communicate their sentiments and wishes. . . . The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives [,] may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will.

1 ANNALS OF CONG. 766 (1834).

of political and social dissatisfaction. A right to petition permits the courts to consider discontent with legislative enactments and to serve as an arena for emphasizing the need for further legislation. A third function of the right to petition is to invoke the law-making power of the courts: Clearly the redress of grievances is accomplished not only through legislative enactment, but by judge-made law as well. Finally, when either the legislature or the judiciary acts to redress grievances, the rights so established may be enforceable only by the courts.[34]

B. *The Supreme Court and First Amendment Access*

It is only in the past decade that the Supreme Court has focused significant attention on the right to petition.[35] Interestingly, much of the recent doctrinal development has involved access to the courts.

The Court first suggested a broad First Amendment right to litigate in *NAACP v. Button*,[36] a decision upholding the right of the NAACP to refer individuals to an attorney. The Court held that:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is the means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, *litigation may well be the sole practical avenue open to a minority to petition for a redress of grievances.*[37]

34. Recognition of a fundamental right of access need not affect such concepts as standing, ripeness, mootness, or exhaustion of remedies. In the federal courts, these are judicially constructed principles derived from the Article III, § 2 requirement of a case or controversy. And although many state constitutions do not include similar provisions, state courts have employed these doctrines as a reasonable means for adjudicating only those claims which are fit for resolution. Such limitations on the right to petition the courts are analogous to similar restrictions on the right of legislative petition, such as the limitations on congressional hearings for private citizens.

35. *But see* United States v. Harriss, 347 U.S. 612 (1954); United States v. Rumely, 345 U.S. 41 (1953).

36. 371 U.S. 415 (1963).

37. *Id.* at 429-30 (emphasis added). Even Justice Harlan, who vigorously dissented on the facts of the case, was adamant in his support of the First Amendment right:

> Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective . . . . And just as it includes the right jointly to petition the legislature for redress of grievances, . . . so it must include the right to join together for purposes of obtaining judicial redress. We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights.

Id. at 452-53 (Harlan, J., dissenting).

The *Button* opinion is, however, cloudy on certain critical doctrinal issues. The Court did not distinguish between the right to petition and the related First Amendment rights of expression and association.[38] Similarly, it is not clear whether the Court was protecting the right to *advocate* litigation, to *associate* for the purpose of litigating, or to *litigate* itself.[39] Finally, even if *Button* is read as protecting the right to litigate, that right may nevertheless be confined to the "vindication of constitutional rights."[40]

In three subsequent cases dealing with the rights of unions to assist members in Federal Employers' Liability Act (FELA) suits,[41] the Court has given additional substance to the First Amendment right of access. In upholding, in *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar,*[42] the right of a union to advise its members on the choice of an attorney, the Court continued to rely on all three First Amendment rights—speech, assembly, and petition. However, it specifically stated that the First Amendment protected not only the right of union members "to assist and advise each other"[43] but also the "right to petition the courts."[44] This access right emerges with even greater clarity in the most recent FELA case, *United Transportation Union v. State Bar of Michigan,*[45] where the Court stated that "[c]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[46] Moreover, by upholding such rights in the context of FELA suits, these decisions rebut any suggestion that the right of access is limited to constitutional litigation.[47]

38. *See id.* at 428, 430.

39. Thus, at one point the Court speaks of the extension of First Amendment protection to "vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429. At another, it states that "association for litigation may be the most effective form of political association." *Id.* at 431. And, at yet a third, the opinion speaks simply of "resort to the courts." *Id.* at 443.

40. *Id.* at 443.

41. Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1970). These cases, like *Button,* all involved attempts by the state to regulate access by laws prohibiting barratry and solicitation.

42. 377 U.S. 1 (1964).

43. *Id.* at 6.

44. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.

Id. at 7.

45. 401 U.S. 576 (1970).

46. *Id.* at 585.

47. The dissenters in *Trainmen* insisted that the case was not controlled by *Button* as the latter protected only "political expression" designed "to secure, through court action, constitutionally protected rights." 379 U.S. 1, 10 (1964) (Clark, J., dissenting). Although the majority opinion did not explicitly reject this position, it did so implicitly

The Court's perception of the access right in both *Button* and the FELA cases is still clouded, however, by its invocation of the "right to associate." Yet it seems untenable to read these cases for the proposition that groups, but not individuals, have a First Amendment right of access. In each case, the association was merely the vehicle for asserting individual claims.[48]

The Court's use of the Free Speech Clause in these cases also seems gratuitous. To be sure, various aspects of litigation can be characterized as speech. Yet the interest involved in each of the cases is access to the judicial process, a right most clearly perceived as an aspect of the right to petition—a particular form of expressive conduct accorded specific protection under the First Amendment.

These doctrinal ambiguities have been largely resolved in *California Motor Transport Co. v. Trucking Unlimited,*[49] where the Court, while warning that instigating "sham" litigation to harass a competitor could be grounds for an antitrust action,[50] strongly affirmed the general First Amendment right of access. Significantly, the *Trucking Unlimited* Court did not rely on the Free Speech or Assembly Clauses; rather the Court found it sufficient to state that "the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition."[51]

In these right-of-access decisions the Court has applied a demanding test to governmental restrictions on the First Amendment. The general standard, set forth in *Button,* is that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[52] Al-

holding that FELA rights were of sufficient importance to warrant protecting the union's activity. In the second FELA case, United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967), the Court specifically stated:

> We think that both the *Button* and *Trainmen* cases are controlling here. The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button,* but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones." . . . Thomas v. Collins, 323 U.S. 516 (1945).

48. Thus, the very purpose of protecting the union's right to provide legal services in the FELA cases was to assure that *individuals* could obtain tort judgments under the FELA.

49. 404 U.S. 508 (1972).

50. *Id.* at 511.

51. *Id.* at 510.

52. 371 U.S. at 438. The Court also indicated that the state must show a "substantial regulatory interest" designed to prevent "substantive evils" before the access right may be restricted. *Id.* at 444. This latter language might be taken to suggest an alternative, and less protective, standard. Yet the Court has recently reaffirmed that First Amendment rights are ones "that the Court has come to regard as fundamental and that demand

though the FELA cases do not explicitly invoke this standard,[53] the Court's emphasis on the "most precious" nature of the access right[54] and its refusal to countenance even "indirect restraints"[55] suggest that it will require a substantial governmental interest before permitting such regulation.[56]

IV. Access Rights for Indigents

A. *Access Rights under the First Amendment*

Expenses such as filing fees, security bonds, attorneys' fees, and notice or discovery costs may be an insuperable obstacle to access for the poor. Where this is the case, the constitutionality of such expenses comes into question under the First Amendment. The Supreme Court has addressed this issue only once, in *Ortwein v. Schwab*,[57] where it

the lofty requirement of a compelling governmental interest before they may be significantly regulated." United States v. Kras, 93 S. Ct. 631, 638 (1973), discussed at pp. 1056-57 *supra*. *See also* Williams v. Rhodes, 393 U.S. 23, 31 (1968).

53. Like *Button*, however, the FELA cases do hold that a state may not apply its barratry laws in a manner that restricts First Amendment rights. United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 580 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 225 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 6-7 (1964); NAACP v. Button, 371 U.S. 415, 437 (1963).

54. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

55. *Id.*; *accord*, Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 7 (1964).

The Court has also applied an exacting standard in two antitrust cases involving the right to petition. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). In *Noerr*, the Court held that the defendant's activity constituted a petition of the legislature, and consequently was immune from suit under the Sherman Act. The Court indicated, however, that where the petition was a "mere sham" it would not be immune. 365 U.S. at 144. The Court gave content to this test when it held, in *Trucking Unlimited*, that a litigant's harassing suits against its competitors could fall within the exception. Significantly, the Court gave the "sham" exception a narrow reading, suggesting that it applies only when suspect litigation has the effect of defeating a competitor's right of "'free and unlimited access' to the agencies and courts." 404 U.S. at 515. Of course, if the Court meant that merely compelling an opponent to commit his resources through extensive litigation is sufficient to amount to a denial of his right of access, then the "sham" exception would be extremely broad. However, the Court found this effect in the context of massive activity before agencies (and the courts on appeal), where actual blockage of an opponent's access was quite conceivable because of limited agency resources. *See id.* The Court's interpretation of the "sham" exception to the First Amendment access right would, therefore, appear to be quite narrow, since actual frustration of an opponent's access to trial courts (given their greater resources) is unlikely.

But see United States v. Harriss, 347 U.S. 612, 625-26 (1954), and United States v. Rumely, 345 U.S. 41, 46-47 (1953) (applying an ambiguous but arguably less protective standard under the First Amendment right to petition). *See* note 70 *infra*.

56. In other contexts the Court has used an ad hoc balancing approach which is not so heavily weighted in favor of the First Amendment and which produces seemingly conflicting results. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 717-18 (1970). A comparison of the Court's attempts to resolve the doctrinal issues in cases dealing with public demonstrations illustrates this lack of coherence. *Compare* Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), *with* Walker v. Birmingham, 388 U.S. 307, 316 (1967), *and* Cox v. Louisiana, 379 U.S. 536 (1965).

57. 41 U.S.L.W. 3473 (U.S. March 5, 1973).

was presented with the contention that the right to petition required the waiver of a filing fee for indigents in appeals from welfare hearings. In a brief footnote to its per curiam opinion, the Court stated that appellants' First Amendment rights were "fully satisfied" by the initial hearing.[58] Thus, the Court seems to feel that the First Amendment does not establish an access right on the appellate level. However, the Court noted that the initial hearing provided "a procedure, not conditioned on payment of any fee, through which appellants have been able to seek redress."[59] From this statement it might be inferred that the First Amendment *does* secure a right of access to the initial hearing unburdened by governmentally-imposed costs. Unfortunately, the Court did not discuss the rationale for, or the implications of, its statements, nor did it discuss the existing precedent concerning the right to petition. Thus the scope of an indigent's First Amendment rights at the trial level, and, in light of the cursory treatment given in *Ortwein v. Schwab*,[60] arguably also at the appellate level,[61] remains open to further inquiry.

1. *Filing Fees*

Filing fees may be justified on three grounds: cost recoupment, deterrence of unmeritorious litigation, and resource allocation. On examination, however, none of these rationales appears sufficiently compelling to justify abridgment of the First Amendment rights of indigent plaintiffs.[62]

Although filing fees are a source of revenue, they presently recoup only a fraction of the cost of operating the courts; most judicial systems are largely tax subsidized.[63] Waiving such fees for indigents should thus

58. *Id.* at 3474 n.5.
59. *Id.* at 3474.
60. The case was decided without benefit of either full briefs or oral argument. *Id.* at 3474 (Douglas, J., dissenting).
61. For First Amendment purposes, it seems difficult to justify a distinction between initial and appellate hearings. The right to petition for the redress of grievances may well require access to the appellate level where it is necessary to obtain relief.
62. In a series of cases the Court has invalidated licensing taxes in the free speech and free press areas. Grosjean v. American Press Co., 297 U.S. 233 (1936) (licensing tax on newspapers invalid as a prior restraint); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) ("Freedom of the press, and freedom of religion are available to all, not merely to those who can pay their own way."); Follett v. McCormick, 321 U.S. 573 (1944). However, in Cox v. New Hampshire, 312 U.S. 569 (1941), the Court sustained a permit fee for the right to parade. Whether *Cox* is still authoritative is doubtful. In any case, the distinction between licensing taxes and permit fees suggested in *Cox* is difficult to justify. *See* T. EMERSON, *supra* note 56, at 310-11.
63. For example, in New York State only about eleven million dollars in an overall budget of $255 million (both criminal and civil) were derived from filing fees in fiscal 1971. Although precise figures are unavailable, it appears that approximately forty percent of the total budget is allocated to civil cases, and thus filing fees provide about

have little effect on the financial status of the courts. The interest in preserving the fisc to this small extent would hardly appear to be "compelling."

Moreover, though filing fees may advance the legitimate goal of deterring unmeritorious litigation, their value for this purpose is questionable. The fee may deter *only the poor* from bringing unmeritorious suits; more prosperous litigants may willingly pay nominal fees to bring even frivolous actions. More importantly, the fees may simultaneously discourage the poor from pursuing meritorious litigation. Where, as here, unnecessarily broad regulatory measures interfere with First Amendment rights, a less drastic means is clearly in order.[64] Simple dismissal for failure to state a claim seems an adequate means of avoiding unmeritorious litigation, yet one which would not interfere with an indigent's legitimate right of access.

Finally, it may be argued that the government has an interest in allocating scarce judicial resources as efficiently as possible, and that requiring the litigant to bear at least part of the court costs may serve this end. If a plaintiff does not feel that the expected value of the judgment he seeks (discounted by his chance of recovering no judgment at all) exceeds even the fraction of actual court costs represented by the filing fee, then arguably his case is not worth trying. When applied to the poor, however, this argument is less than convincing. An indigent might well find himself without sufficient liquid resources to pay the fee, even though the reasonably expected value of the judgment he seeks is substantially larger. Moreover, it is incorrect to view the allocative problem merely in terms of the judgment to be awarded the plaintiff. Even suits that yield small judgments may serve signifi-

ten percent of the total revenues for civil courts. Telephone interview with N. O'Brien, Assistant Supervisor, Budget Division, Judicial Conference of the State of New York, Feb. 26, 1973.

In Connecticut $1.5 million in a total budget of $22 million were derived from the entry fee for fiscal 1971. Telephone interview with E. Criscuolo, Chief Accountant, Judicial Department, State of Connecticut, Feb. 23, 1973. Assuming that Connecticut's civil caseload is proportional to that of New York, fees account for roughly seventeen percent of the civil court revenues.

But see United States v. Kras, 93 S. Ct. 631, 639 (1973) (fees in bankruptcy designed to make system "self-sufficient").

64. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 267-93 (1964). *But see* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

An alternative less drastic means of deterring frivolous suits might be a more efficient (and hence more justifiable) fee system, perhaps based on a progressive, sliding scale related to either the amount of the claim or the income of the claimant. Such a progressive system of allocating the costs of litigation could also be applied to notice, security, or attorney expenses. Of course, some individuals may be so destitute that even a sliding fee schedule would not operate effectively; waiver would then be required.

cant precedential or deterrent functions.[65] Finally, the application of such narrow efficiency norms may have the effect of barring the poor as a class from enforcing many valid claims, simply because those claims are likely to be comparatively small. The result may be not only considerable individual hardship,[66] but diminished respect for the law as well.

There is precedent as well as reason to support the conclusion that the government's interest in filing fees is insufficiently compelling to warrant an abridgment of the access rights of indigents. In *Boddie*, the Court explicitly rejected resource allocation and cost recoupment as justifications for fees that interfered with the due process right of access.[67] And in *Lindsey v. Normet*, the Court similarly rejected the argument that a double bond could be justified as a deterrent to unmeritorious appeals.[68] Finally, the legislatures of approximately half the states, by enacting *in forma pauperis* statutes, have indicated that in their judgment the right of access outweighs any state interest in filing fees.[69]

2. *Attorneys' Fees*

It is less clear that the right to petition requires the government to cover attorneys' fees or related costs, such as those involved in discov-

65. This is particularly true in consumer class actions, in which one victory in a theoretically trivial action can affect the practices of an entire industry. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Moreover, such actions may be important in using the courts as means of allocating the risks and benefits of a variety of social transactions. It is obvious that one who creates social costs, whether intentionally or through mere negligence, will have no incentive to avoid such costs if he knows he will not, as a practical matter, be called upon to answer for them in court. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS 73-75 (1970).

66. Even if there are cases in which limitations on access rights can be justified on grounds of allocative efficiency, the state may be required to mitigate the resulting hardship to frustrated plaintiffs by compensating them for the claims they forego. *See* note 90 *infra*.

67. We are thus left to evaluate the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). In *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process. While in *Griffin* the transcript could be waived as a convenient but not necessary predicate to the court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of *Griffin* covers this case.

401 U.S. at 382. *Cf.* Ortwein v. Schwab, 41 U.S.L.W. 3473, 3474 (U.S. Mar. 5, 1973), where the Court found that the fee system was a rational means of cost recoupment. Since the Court found no right of access, it did not address the question of whether such an interest was compelling.

68. The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars non-frivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond.

405 U.S. at 78.

69. *See* Silverstein, *supra* note 1, at 33-36.

ery. Strictly speaking, such expenditures are not court-imposed, nor are they essential in gaining access to the courts. Moreover, the parallel to the legislative petition is suggestive, for though a fee on petitions themselves or on the act of lobbying might be suspect,[70] the government clearly need not pay the salaries of lobbyists or provide transportation for citizens who wish to address their representatives.[71]

Still, one might argue that the right to petition is really the right to make an "effective" petition, and that, given the importance of legal assistance, this requires the government to reimburse indigents for attorney or discovery expenses. The Supreme Court has taken an analogous position with respect to the rights of criminal defendants under the Due Process Clause.[72] Yet, while there is one brief reference to "meaningful access" in its *United Transportation Union* decision,[73] there is at present little other authority for the proposition that the First Amendment places such an affirmative duty on the state.[74]

3. *Notice Costs*

Courts considering class actions will generally order notice to absent members of the class to inform them of the action and of their right to withdraw from it.[75] Such costs, like attorneys' fees, are paid not to the court but to third parties (usually newspapers or the postal system). Yet, unlike attorneys' fees, notice expenses are non-discretionary. The inability to pay such costs, which are often substantial,[76] may result in the dismissal of the suit as a class action, despite the fact that

70. Interestingly, several states currently impose registration fees on paid lobbyists. *See, e.g.*, CONN. GEN. STAT. REV. § 2-45 (Supp. 1969) (thirty-five dollar fee); IND. ANN. STAT. § 34-307 (1969) (two dollar fee). Although there is no indication that these statutes have yet been subjected to attack, their constitutionality seems questionable.

Registration and disclosure provisions—without any fee—have been upheld in the case of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-70 (1970). In United States v. Harriss, 347 U.S. 612 (1954), the Court sustained the Act after giving it a narrow construction which imposed its requirements only on "direct communication" to Congressmen. *Id.* at 623. The test used in sustaining this aspect of the Act is unclear, although it appears to have been an ad hoc balancing approach. *See id.* at 625. General disclosure and registration provisions, however, have been sharply criticized. T. EMERSON, *supra* note 56, at 640. In any case, the requirement of registration does not work the same preclusive effect as do monetary barriers for the poor.

71. Arguments in favor of a right to counsel and to payment of discovery costs might more easily be made under the Due Process Clause, which regulates the incidents of a hearing. *See* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 558-59 (1967); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1329-33 (1966).

72. Griffin v. Illinois, 351 U.S. 12 (1956). *See* cases cited in note 21 *supra*.

73. 401 U.S. at 585.

74. *See generally* T. EMERSON, *supra* note 56, at 648-53.

75. *See, e.g.*, FED. R. CIV. P. 23(c)(2).

76. For example, in Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D. Pa. 1971) (a truth-in-lending case), the cost of notice was estimated at $37,500. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55, at 61 (Supp. 1972).

the individual claims may be meritorious. In theory, the individuals thus barred from pursuing their claims through a class action are not denied access to the courts completely, since they may sue as individuals. In reality, however, it is highly unlikely that class members will sue on their own behalf, either because they are ignorant of their rights or because they are unable to pay the costs involved in bringing an individual action. Thus, a strong right-of-access case can be made for requiring the government to defray all or part of the costs of notice where such costs exceed the plaintiff's resources.[77] In fact, since the class action serves as an efficient mechanism for avoiding the wasted effort of adjudicating a large number of identical cases, it would appear to be in the financial interest of the state, as well as of the potential plaintiffs, to facilitate such suits as a matter of sound judicial policy.

4. *Security Bond Expenses*

Under certain circumstances, a court may require that the plaintiff[78] post some security before proceeding with an action.[79] As with notice requirements imposed to protect the rights of others, it may be argued that the court must relieve the plaintiff of such costs when there is no other way to effectuate his First Amendment right of access.[80] Where waiver of the security requirement would clearly infringe upon the interests of the defendant, the court could either provide the premium necessary for a bond or act as surety itself.[81] To be sure, the latter ap-

77. Payment of notice costs may entail a greater financial burden for the state than waiver of the filing fee. However, the cost of this notice to the state may be minimized by ordering notice that is less costly than first-class mail notice but that still gives adequate notification of the suit. *See, e.g.*, Doglow v. Anderson, 43 F.R.D. 472, 498 (E.D.N.Y. 1968); Booth v. General Dynamics Corp., 264 F. Supp. 465, 472 (N.D. Ill. 1967). Moreover, the court may apportion the cost between plaintiff and defendant at a pretrial hearing in order to effectuate due process and avoid cost to the government. *See* Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 567 (S.D.N.Y. 1972) (defendant ordered to prepay ninety percent of notice costs).

78. The text focuses on the rights of plaintiffs, as opposed to defendants, for two reasons. First, it is to plaintiffs that the right to "petition" most obviously and naturally extends. Second, the rights of defendants have already been elaborated under the Due Process Clause, and it seems unlikely that the First Amendment right to petition would add to them substantially.

However, it might well be argued that confining a right of access to just one of the parties to a lawsuit is highly artificial. Moreover, the Due Process Clause has yet to be interpreted to require that the court meet the costs of posting security in cases where the defendant is indigent.

79. Most states have a number of security requirements for plaintiffs. *See, e.g.*, N.Y. CIV. PRAC. §§ 6312(b) (injunction), 5519 (appeals) (McKinney 1963); N.Y. CIV. PRAC. § 8503 (McKinney Supp. 1972) (costs).

80. A due process rationale for waiver of certain types of bonds may be found in Note, *Indigent Access to Civil Courts, supra* note 3, at 59-64. *See also* Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668 (1966), *cert. denied*, 385 U.S. 1037, 1039 (1967) (Douglas, J., & Warren, C.J., dissenting), *supra* note 26.

81. It may be more economical for the state to act as surety itself, since the costs of providing security are internalized, thus eliminating the necessity of providing a

proach could lead to situations where the state would have to pursue the indigent plaintiff for repayment. But if the state finds that the benefits of such security arrangements are substantial (and many states do not),[82] then this inconvenience may merely be the price it must pay to protect the First Amendment rights of its citizens.

B. *Access Rights under the First Amendment and the Equal Protection Clause*

The preceding discussion has focused exclusively on the First Amendment rights of indigents. Alternatively, access barriers might be challenged on equal protection grounds. There seems little question that First Amendment rights are "fundamental" interests which, under current doctrine, cannot be regulated on the basis of a "suspect" classification without some compelling state interest.[83] Yet, while the Court has on occasion voided state measures that condition the enjoyment of fundamental rights on an individual's wealth,[84] several recent decisions suggest that the present Court is not receptive to the view that wealth is a suspect classification.[85]

Moreover, it is not clear that the relief mandated under such a theory would extend any further than that required by the First Amendment alone. The standard applied by the Court in the right-to-petition cases[86] appears just as strict as the "compelling state interest" standard required under the Equal Protection Clause.[87] Thus, while the combination of First and Fourteenth Amendment rights provides a powerful argument which the courts must consider in the case of indigent plaintiffs, suspect classification analysis may not be necessary where, as here, the fundamental interest at stake is itself of constitutional proportions.[88]

bondsman with a profit. If, however, the judiciary relied upon private bondsmen, there might well be instances where the indigent was so destitute that no bond would issue because of the high risk of nonpayment. Arguably the state should post security in such cases.

82. *See* Note, *Indigent Access to Civil Courts, supra* note 3, at 29.

83. *See* Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Williams v. Rhodes, 393 U.S. 23 (1968); Niemotko v. Maryland, 340 U.S. 268 (1951).

Current equal protection doctrine is surveyed in *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1087-1132 (1969).

84. *See* note 21 *supra.*

85. *See, e.g.,* James v. Valtierra, 402 U.S. 137, 141 (1971); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970). *But see* Bullock v. Carter, 405 U.S. 134 (1972).

86. *See* pp. 1062-63 *supra.*

87. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

88. On those occasions on which it has invoked equal protection doctrine in invalidating state regulation that touches upon First Amendment rights, the Supreme Court has in fact been quite ambiguous as to whether its holding could be reached on First Amendment grounds alone. *See* Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968); Niemotko v. Maryland, 340

V. Toward a First Amendment Right of Access for the Non-Poor

The discussion thus far has considered the First Amendment right of access only as it extends to the poor. Yet governmentally-imposed costs of litigation may also abridge the access rights of more prosperous citizens.

To be sure, the governmental interest in raising revenues, deterring unmeritorious suits, and allocating judicial resources seems more compelling once the plaintiff can at least meet the costs of litigation. Such considerations evidently discouraged the Court in *Griffin v. Illinois*[89] from going further than requiring relief for indigents from financial barriers to an effective criminal defense. A similar approach may be appropriate in effectuating the First Amendment right of access.[90]

But if, as argued here, the right to litigate is protected by the First Amendment even apart from any suspect classification analysis, then the state may lack sufficient justification for regulating the access rights of any citizen, rich or poor. Thus, in *Harper v. Virginia Board of Elections*[91] the Court struck down a poll tax as applied to all citizens,

U.S. 268, 272-73 (1951).

Of course, there may well be situations in which equal protection doctrine would have wider ramifications than the First Amendment right alone. Thus, suspect classification analysis in conjunction with the fundamental right of access may call into question the validity of jurisdictional amount requirements, such as those commonly applied in the federal courts. *See, e.g.*, 28 U.S.C. §§ 1331, 1332, 1335, 1346(a) (1970). These limitations are not mandated by the Constitution, but arguably fall within the scope of Congress' power to establish lower federal courts under Article III, § 2. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8 (1799). It could well be argued, however, that these restrictions on the jurisdiction of the courts establish a de facto wealth classification. Although such requirements are not tied directly to the litigant's wealth, but rather to the size of his claim, it is likely that their impact falls most heavily upon the indigent.

Jurisdictional amount requirements, of course, do not generally operate to bar litigation entirely, but only to limit the choice of forum. Nevertheless, this limitation may disadvantage the plaintiff sufficiently to amount to an infringement of the access right.

The jurisdictional amount requirements may be defended as serving a compelling state interest in resource allocation; removal of the restriction could lead to long delays and inefficient handling of claims. Whether a jurisdictional amount requirement is a reasonable means of serving this end, however, is open to question. Again, a less drastic means of regulating case load, such as a jurisdictional amount requirement geared to the plaintiff's wealth, might well be available. *See* note 64 *supra*.

89. 351 U.S. 12 (1956). *See* cases cited in note 21 *supra*.

90. Even if resource allocation—in this case certainly the strongest of the state's interests—should be deemed sufficiently compelling to justify limitations on the right of access, the First Amendment would require that the state take the least drastic means of pursuing its efficiency goals. *See* note 64 *supra*. Thus, if the state chooses to bar litigation, whether through fees or otherwise, where the costs of adjudication will exceed the value of the judgment, it may be required to reimburse the plaintiff for the claim he foregoes. An analogous approach can be found in the movement toward no-fault automobile accident compensation schemes, which typically deprive individuals of their right to an action on the grounds that the litigation involved is an inefficient means of allocating social costs and benefits, yet at the same time provide an alternative means of compensating victims. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 38-319 to 351a (Supp. 1973).

91. 383 U.S. 663 (1966).

rather than simply requiring waiver of the tax for the poor.[92] Though the rationale of *Harper* is less than clear, the Court emphasized the critical importance of voting as a right " 'preservative of all rights,' "[93] and may have felt that, given this vital interest, the inhibiting effect of even a nominal fee could not be tolerated. Similar reasoning might well be invoked to require the invalidation of all court-imposed costs of litigation, regardless of the plaintiff's financial condition.

VI. Conclusion

The First Amendment right to petition provides a more secure and comprehensible foundation for a right of judicial access than does the due process approach of *Boddie*. The First Amendment right is independent of the nature of the interest at stake in the litigation; furthermore, unlike the Due Process Clause, the right to petition quite naturally encompasses the rights of plaintiffs. Thus, the First Amendment firmly anchors the access right in a specific constitutional safeguard that places a heavy burden of justification upon any governmental restriction. The cursory and ambiguous treatment of the First Amendment in *Ortwein* is clearly inadequate; the right to petition merits more careful consideration.

92. *See* Bullock v. Carter, 405 U.S. 134 (1972) (striking down filing fees for candidates in state primaries as a violation of equal protection).
93. 383 U.S. at 667, *quoting* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).